Menta Construction Sdn Bhd v Lestari Puchong Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–2882–12 OF 2012
ABDUL WAHAB PATAIL, ZAWAWI SALLEH AND UMI KALTHUM JJCA
29 DECEMBER 2014

Contract — Mistake — Rectification — Sale and purchase agreement — Whether clause requiring purchaser to make payment towards redemption sum mistakenly included into the agreement — Whether agreement to be rectified by removal of the clause — Whether mistake proven — Issue of mistake only raised two years later — Whether rectification should be ordered — Specific Relief Act 1950 ss 30, 31, 32 & 33

The plaintiff/appellant had undertaken various construction works for the Talam Group of Companies, including the defendant/respondent ('the Talam Group'). The Talam Group was unable to pay the plaintiff for the works done. As a result of the same, the plaintiff and the Talam Group had entered into a settlement agreement ('the settlement agreement'). Under the settlement agreement, the total sum of RM56m owed by the Talam Group to the plaintiff was to be settled by way of payment of RM20m and the balance RM36m by way of set-off against three pieces of land. Simultaneous to the execution of the settlement agreement, the plaintiff and the Talam Group had also executed ten agreements of which one agreement was the sale and purchase agreement dated 29 July 2005 ('SPA3') between the plaintiff and the defendant in respect of Lestari Puchong Land. The plaintiff had in the High Court sought to rectify cl 2.2 of SPA3 by its removal and the consequently sought specific performance of the rectified agreement. The plaintiff contended that cl 2.2, which required the plaintiff to make payment towards the redemption sum, was included in SPA3 as a result of a common mistake by both the plaintiff and the defendant. The plaintiff claimed that it was not required to make any payment towards the redemption sum, and that the Puchong Lestari Land was to be transferred to the plaintiff at Talam Group's cost and expense. The defendant contended that there was no mistake in the inclusion of cl 2.2 as the plaintiff was at all material time required to pay the redemption sum. In dismissing the plaintiff's claim, the learned trial judge ('judge') found that the plaintiff had failed to prove on the balance of probabilities that the insertion of cl 2.2 in the SPA3 was a mistake. The plaintiff appealed against this decision claiming that the judge had failed to consider ss 30–33 of the Specific Relief Act 1950 ('the Act') in determining whether rectification should be ordered. It was also submitted that there were overwhelming evidence to show that cl 2.2 was a mistake and did not accord with the true intention of the parties.

Held, dismissing the appeal with costs:

(1) In as much as the judge did not specifically refer to the provisions of ss 30–33 of the Act, she had in fact referred to the authority of the *Federal Court case of Yuson Bien & Anor v Bankers Trust Co Ltd* [1980] 1 MLJ 32 on the principles of rectification, and by her consideration of the pertinent facts, the judge had in effect applied the provisions of the said sections (see para 15(a)).

(2) The court could not see how it could be said that it was a mistake to include cl 2.2 in the SPA3. In fact it was essential to include cl 2.2 in order to enable the defendant to fulfil its other obligations to surrender the Puchong Lestari Land to the plaintiff. Clause 2.2 provided specifically that it was the plaintiff, as purchaser, to settle, pay, satisfy and redeem the Puchong Lestari Land at RM7m to Pengurusan Danaharta Nasional Bhd and Malayan Banking Bhd in the ratio of 60:40. It therefore followed that any other clauses, such as cll 6.2, 6.12 and 6.16 of the SPA3 which were contradictory to cl 2.2, must necessarily be read subject to cl 2.2 (see paras 15(b)–(c)).

(3) The judge had correctly made findings of fact to found her judgment, especially those facts surrounding the negotiations and conclusion of the SPA3 and the court could not see any reason to intervene in her findings (see para 15(d)).

(4) It was also a significant fact found by the judge that after the plaintiff had signed the SPA3, it took the plaintiff two years to raise the issue of mistake in cl 2.2 (see para 15(e)).

[Bahasa Malaysia summary

Plaintif/perayu telah melaksanakan pelbagai kerja-kerja pembinaan Kumpulan Syarikat Talam, termasuk defendan/responden ('Kumpulan Talam'). Kumpulan Talam tidak dapat membayar plaintif untuk kerja-kerja yang dijalankan. Akibatnya, plaintif dan Kumpulan Talam telah memasuki perjanjian penyelesaian ('perjanjian penyelesaian'). Di bawah perjanjian penyelesaian, jumlah keseluruhan sebanyak RM56 juta yang kena dibayar oleh Kumpulan Talam kepada plaintif adalah dikehendaki diselesaikan melalui bayaran RM20 juta dan baki RM36 juta melalui penolakan terhadap tiga bidang tanah. Serentak dengan pelaksanaan perjanjian penyelesaian, plaintif dan Kumpulan Talam juga telah melaksanakan sepuluh perjanjian di mana salah satu daripadanya adalah perjanjian jual beli bertarikh 29 Julai 2005 ('SPA3') di antara plaintif dan defendan berkaitan Lestari Puchong Land. Plaintif telah di Mahkamah Tinggi memohon untuk membetulkan klausa 2.2 SPA3 dengan memindahkannya dan akhirnya memohon perlaksanaan spesifik perjanjian yang diperbetulkan. Plaintif berhujah bahawa klausa 2.2, yang mengkehendaki plaintif untuk membuat bayaran terhadap jumlah penebusan, dimasukkan ke dalam SPA3 akibat kesilapan bersama oleh kedua-dua plaintif

dan defendan. Plaintif mendakwa bahawa ia tidak dikehendaki untuk membuat bayaran kepada jumlah penebusan tersebut, dan bahawa Puchong Lestari Land adalah dikehendaki dipindahkan kepada plaintif pada kos dan perbelanjaan Kumpulan Talam. Defendan berhujah bahawa tidak terdapat kesilapan dalam kemasukan klausa 2.2 kerana plaintif pada kesemua masa material dikehendaki untuk membayar jumlah penebusan tersebut. Dalam menolak tuntutan plaintif, hakim perbicaraan yang bijaksana ('hakim') mendapati bahawa plaintif telah gagal untuk membuktikan atas imbangan kebarangkalian bahawa kemasukan klausa 2.2 dalam SPA3 adalah kesilapan. Plaintif merayu terhadap keputusan ini dengan mendakwa bahawa hakim telah gagal untuk mempertimbangkan ss 30 sehingga 33 Akta Relief Spesifik 1950 ('Akta') dalam menentukan sama ada pembetulan patut diperintahkan. Ia juga dihujahkan bahawa terdapat keterangan yang kukuh untuk menunjukkan bahawa klausa 2.2 adalah kesilapan dan tidak bertepatan dengan niat sebenar pihak-pihak.

Diputuskan, menolak rayuan dengan kos:

(1) Memandangkan hakim tidak merujuk secara spesifik kepada peruntukan ss 30–33 Akta, beliau sebenarnya merujuk kepada kes authoriti *Mahkamah Persekutuan Yuson Bien & Anor v Bankers Trust Co Ltd* [1980] 1 MLJ 32 atas prinsip pembetulan, dan dengan pertimbangannya terhadap fakta berkaitan, hakim telah sebenarnya menggunapakai peruntukan seksyen-seksyen tersebut (lihat perenggan 15(a)).

(2) Mahkamah tidak dapat mengamati bagaimana ia dapat dikatakan ia adalah kesilapan untuk memasukkan klausa 2.2 dalam SPA3 tersebut. Sebenarnya ia adalah penting untuk memasukkan klausa 2.2 supaya dapat membolehkan defendan memenuhi tanggungjawabnya yang lain untuk menyerahkan Puchong Lestari Land kepada plaintif. Klausa 2.2 memperuntukkan secara spesifik bahawa adalah plaintif, sebagai pembeli, untuk menyelesaikan, membayar, memenuhi dan menebus Puchong Lestari Land pada RM7 juta kepada Pengurusan Danaharta Nasional Bhd dan Malayan Banking Bhd dalam ratio 60:40. Oleh itu apa-apa klausa yang lain, seperti klausa-klausa 6.2, 6.12 dan 6.16 SPA3 yang mana bertentangan kepada klausa 2.2, perlu dibaca tertakluk kepada klausa 2.2 (lihat perenggan 15(b)–(c)).

(3) Hakim telah secara betul membuat dapatan fakta untuk penghakimannya, terutamanya fakta menyelubungi rundingan dan kesimpulan terhadap SPA3 dan mahkamah tidak dapat melihat apa-apa alasan untuk campur tangan dapatannya (lihat perenggan 15(d)).

(4) Ia adalah juga fakta penting yang didapati oleh hakim bahawa selepas plaintif telah menandatangani SPA3 tersebut, plaintif mengambil masa dua tahun untuk membangkitkan isu kesilapan dalam klausa 2.2 (lihat perenggan 15(e)).]

Notes

For cases on rectification, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 5656–5660.

Cases referred to

Yuson Bien & Anor v Bankers Trust Co Ltd [1980] 1 MLJ 32, FC (refd)

Legislation referred to

Specific Relief Act 1950 ss 30, 31, 32, 33

Appeal from: Civil Suit No S3–22–973 of 2008 (High Court, Kuala Lumpur)

Cyrus Das (Sri Kumar with him) (Kumar Partnership) for the appellant.
Chin Tzi Song (Emmy Hazwani Jamil with him) (Arifin & Partners) for the respondent.

Umi Kalthum JCA:

[1] This is an appeal against the decision of the High Court after full trial where the learned trial judge dismissed the appellant's claim for rectification of a written contract on the basis of mutual mistake.

[2] We heard the respective parties' submissions and we unanimously dismissed the appeal with costs as agreed at RM15,000, and we refunded the deposit to the appellant. We now give our reasons.

[3] For ease of reference we will refer the appellant as the plaintiff and the respondent as the defendant.

BACKGROUND FACTS

[4] The relevant background facts as submitted by the parties are as follows:

(a) the plaintiff had undertaken various construction works for the Talam Group of Companies, including the defendant ('the Talam Group') between 1997–2004. The Talam Group was unable to pay the plaintiff for the works done in the sum of RM57,425,697.82. As a result of the same, the plaintiff and the Talam Group had entered into a settlement agreement dated 29 July 2005 ('the settlement agreement');

(b) the main feature of the settlement agreement which are relevant to this appeal are as follows:

(i) it was agreed that the total indebtedness owed by the Talam Group to the plaintiff was RM56m ('the agreed sum');

(ii) the Talam Group was to settle the agreed sum by way of payment of RM20m and the balance RM36m by way of set-off against three pieces of land known as 'Saujana Puchong Land A', 'Saujana Puchong Land B', and 'Lestari Puchong Land'; and

(iii) simultaneous to the execution of the settlement agreement, the plaintiff and the Talam Group had also executed ten agreements, of which three were in respect of the Lestari Puchong Land, being the bone of contention between the parties in this appeal. The three agreements are the sale and purchase agreement dated 29 July 2005 ('the SPA3') between the plaintiff and the defendant in respect of Lestari Puchong Land, the development agreement dated 29 July 2005 between the plaintiff and the defendant in respect of Lestari Puchong Land, and the power of attorney dated 29 July 2005 given by the defendant to the plaintiff in respect of the Lestari Puchong Land; and

(c) the plaintiff's claim in the High Court only concerned the Lestari Puchong Land and the SPA3 (pp 384–400, AR Vol 2(2)). The plaintiff sought, amongst others, to rectify cl 2.2 of SPA3 by its removal and the consequently sought specific performance of the rectified agreement.

THE PLAINTIFF'S CONTENTION IN HIGH COURT

[5] It was the plaintiff's contention in the High Court that cl 2.2 of the SPA3 was included in SPA3 as a result of a common mistake by both the plaintiff and the defendant. The plaintiff claimed that it was not required to make any payment towards the redemption sum, and that the Puchong Lestari Land was to be transferred to the plaintiff at Talam Group's cost and expense. Clause 2.2 of the SPA3 provides:

> 2.2 The Purchaser [*the Plaintiff*] shall settle, pay, satisfy and redeem the Project Land at Ringgit Malaysia SEVEN MILLION (RM7,000,000-00) or thereabouts ('Redemption Sum') to PENGURUSAN DANAHARTA NASIONAL BERHAD and MALAYAN BANKING BERHAD at the ratio of 60:40.

(see Tab 10, p 277, core bundle.)

THE DEFENDANT'S CONTENTION IN HIGH COURT

[6] The defendant contended that there was no mistake in the inclusion of cl 2.2 in SPA3. Pursuant thereto the plaintiff was at all material time required to pay the redemption sum of RM7m.

BEFORE THE HIGH COURT

[7] In dismissing the plaintiff's claim, the learned trial judge found that the plaintiff had failed to prove on the balance of probabilities that the insertion of cl 2.2 in the SPA3 was a mistake and had not been intended by the parties. She found the plaintiff's assertions to be largely a bare and unsubstantiated assertions and not sufficiently proven. The following are what were found by the learned trial judge, and we can do no better than to quote her:

> 5.3 ... In this regard, it was clear that the terms of 'the SPA' were unambiguous and unmistakable. Prior to the execution of the agreements, the plaintiff's shareholder and director PW1, and the plaintiff's general manager Mr Kalaisevan, had been involved in meetings with the defendant's directors and the defendant's senior vice president, DW1.
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> 5.4 DW1 who had attended several meetings to discuss the settlement terms with the plaintiff had confirmed that the plaintiff was informed of the subsisting legal charge over the land and despite the plaintiff's objection, the defendant had not agreed to the plaintiff's request to waive the redemption payment as the transferred land was worth more than the stated amount of RM18m. The plaintiff was confirmed by DW1 to have finally agreed to pay the contentious redemption payment to redeem the land.
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> 5.5 Although PW1 claimed that he had not read and, had hastily signed 'the SPA' at the defendant lawyer's office, the plaintiff could not have been ignorant of its content. PW1 admitted that the plaintiff had been given the finalised copy of 'the SPA' and, he further confirmed that the plaintiff's general manager, Mr Kalaisevan have personally checked and 'approved' the final copy of 'the SPA' prior to PW1's signing. In this regard, the court thus concluded that the plaintiff was given the opportunity to peruse 'the SPA' but had opted to leave the vetting of 'the SPA' to the plaintiff's general manager. PW1 and Mr Kalaisevan, were personally involved and, had attended several meetings with 'Talam Group' to discuss and finalise parties' settlement terms which resulted in the execution of the agreements between the plaintiff and 'Talam Group'.
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> 5.6 PW1 conceded that he had acted in haste and, should have personally checked 'the SPA' prior to his signing. The plaintiff further admitted that he could read and understand English and that he had made a mistake in failing to appoint a solicitor to advise him. It was thus clear to the court that in view of the plaintiff's authorised representatives' active participation and involvement in the negotiation with 'Talam Group' preceding the execution of 'the SPA', any mistake in 'the SPA' would have been detected by the plaintiff and the plaintiff would have been aware of the contractual provisions, implication and consequences of 'the SPA'. Accordingly, cl 2.2 of 'the SPA' could not have been wrongly included as claimed by the plaintiff.
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> 5.7. Following the execution of the agreements, the plaintiff would have received the stamped copies of the same within two months from the date of its execution. In this respect despite the plaintiff's 'presumed' receipt of the stamped agreements by end September 2005, the plaintiff failed to complain and alert the defendant of the mistaken insertion of cl 2.2 of 'the SPA'.

> 5.8 PW1 had raised the issue if waiving the redemption sum which had been discussed extensively at parties' meetings. The defendant had disagreed to the plaintiff's request to waive its obligation to pay the redemption sum. The plaintiff had finally agreed to pay the stated redemption sum to the financiers after several meetings, hence the inclusion of cl 2.2 in 'the SPA'. There was thus no ambiguity in the construction of the clearly worded terms of cl 2.2 of 'the SPA'.
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> 5.9 The plaintiff's complaint to the defendant of the purported mistaken inclusion of cl 2.2 of 'the SPA' was only made on 4 September 2007, two years after parties' execution of 'the SPA', on 29 July 2005. The plaintiff's complaint significantly, was only raised pursuant to the defendant's letter dated 22 August 2007 alleging the plaintiff's failure to pay and, demanding the plaintiff's payment of the redemption sum. The court thus concluded that the plaintiff had only raised the issue of the mistake to avoid the plaintiff's clear legal obligation to pay the financiers, 'Danaharta' and 'MBB' the outstanding redemption sum.
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> 5.10 In this regard, the burden of proving parties' true intention at the time of the execution of 'the SPA' was clearly on the party alleging the mistake. As cl 2.2 had clearly imposed on the plaintiff the obligation to redeem the property for the stated sum, it was thus incumbent on the plaintiff to prove that cl 2.2 was a mistakenly included, and that it was never the parties' intention for the plaintiff to bear the obligation of redeeming the land from 'Danaharta' and 'MBB', for a consideration.
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> 5.11 The burden of proving the existence of a mistake in the inclusion of cl 2.2 lies on the plaintiff. It was however not open to the plaintiff to dispute the clear, plain and ordinary meaning of the contentious clause ...

The learned trial judge then referred to the Federal Court case of *Yuson Bien & Anor v Bankers Trust Co Ltd* [1980] 1 MLJ 32 and quoted Ajaib Singh J (as he then was) where the learned judge quoted Cheshire and Fifoot's *Law of Contract* (8th Ed), at p 219 on the standard of proof required in a case of rectification of an agreement, as follows:

> The burden of proving this common and continuing intention lies upon the party who claims that the written contract should be rectified. As regards the standard of proof required all that can be said is that the claim will fail unless the common intention upon which it is based is proved by *convincing* evidence. It is not necessary that the evidence should be irrefragable ... or that it should settle the question 'beyond reasonable doubt' as is demanded by the criminal law. If the negotiations leading up to the execution of the written instrument were vague and inconclusive, so that it was impossible to ascertain what the parties really meant, then the writing represents the only agreement that had been concluded, and there is no antecedent and common intention upon which rectification can be based.
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> Moreover, it must be shown that the alleged common intention, though once undoubtedly reached, continued unchanged down to the time when the instrument was reached. Proof that parties varied their original intention and that the instrument represented what they finally agreed is fatal to a suit for rectification.
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> Finally, it must be emphasized that the issue relates not to be individual intention of the parties, but to their common intention. If the Defendant can satisfy the court

that he understood the agreement to be exactly what was stated in the written instrument, rectification will be excluded. A

The learned trial judge then continued to state the following:

5.12 In ascertaining parties true intention, due consideration must be to the remaining agreements to determine whether or not cl 2.2 had been mistakenly inserted. Parties' executed agreements and, surrounding circumstances preceding its execution, ought to be examined and construed in its entirety to ascertain the consistency of cl 2.2 of 'the SPA' with parties' intent. B

5.13 In this regard parties' contemporaneous agreements had been simultaneously executed to give effect to parties' settlement terms. It is settled principle that where a transaction had involved more than one document or instrument, the court would construe the combined effect of all of the documents together ... C

5.14 It is also settled rule of construction that where several documents were executed contemporaneously, all of the documents must be read and construed collectively as if they were one ... D

5.15 In this regard, cl 2.2 was found to be generally consistent with the recital, the provision of 'the SPA' and, the agreements executed pursuant to parties' settlement terms. Upon construction of the executed agreements in its entirety, it was evident that the plaintiff had agreed to redeem the land from the financiers due to the considerable potential profits to be gained from the development rights consequent to the land transfer. In the settlement of Talam Group's indebtedness, parties' transaction had not only involved Talam Group's transfer of land to the plaintiff but, had further involved a multitude of commercial consideration and transaction that surpassed the transfer. E

5.16 Parties' settlement terms had involved not only the transfer and conveyance of Talam Group's land to the plaintiff but, further conferred on the plaintiff development rights as a licensed housing developer and, allowed the plaintiff to receive monetary proceeds from the development of the land ... F

5.17 Based on the potential gain from the development of the land, it was highly probable and conceivable for the plaintiff to agree to the payment of the redemption sum of RM7m as envisaged in cl 2.2 of 'the SPA'. In any event, the plaintiff had been confirmed to have agreed at parties' meeting to the payment of the redemption sum. Further, 'the SPA', clearly provided that parties were not entitled to institute any action in respect of the outstanding sum as 'the SPA' constitutes parties' final and absolute settlement agreement. G H

5.18 The recital to 'the SPA' had clearly stated that Lot 50603 [*the Lestari Puchong Land*] had been charged to 'Danaharta' and 'MBB' and, cl 2.2 further provide that the plaintiff shall pay, settle, satisfy and redeem Lot 50603 at RM7m. These two provisions of 'the SPA' was stated in clear and unambiguous term and, were clearly complementary and consistent with parties' understanding as reflected in parties' other agreements. It was evident that the agreements were executed to effectuate parties' intention pursuant to the settlement agreement. PW1 confirmed the intention and purpose of parties' execution of the agreements which, with the exception of cl 2.2 of 'the SPA', was agreed by the plaintiff. I

5.19 The plaintiff claimed that cl 2.2 was inconsistent and, did not reflect parties' true intention. Clause 2.2 was claimed to be repugnant to the remaining subsequent provisions of SPA1, namely cll 6.2, 6.12 and 6.16 which generally provided that Lot 50603 was free from encumbrances. In this regard, it was clear to the court that in view of its unambiguous and undisputed clarity, cl 2.2, was clearly intended to prevail over the stated clauses ...

THE APPEAL

[8] Before us, the plaintiff submitted that the learned trial judge had failed to consider ss 30–33 of the Specific Relief Act 1950 ('the Act') or the principles from case law on the subject of determining whether rectification of a contract should be ordered. Sections 30–33 of the Act are as follows:

CHAPTER III

RECTIFICATION OF INSTRUMENTS

When instrument may be rectified

30 When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention, either party, or his representative in interest, may institute a suit to have the instrument rectified: and if the court find it clearly proved that there has been fraud or mistake in framing the instrument, and ascertain the real intention of the parties in executing the same, the court may in its discretion rectify the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

Presumption as to intent of parties

31 For the purpose of rectifying a contract in writing, the court must be satisfied that all the parties thereto intended to make an equitable and conscientious agreement.

Principles of rectification

32 In rectifying a written instrument, the court may enquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the enquiry what the language of the instrument was intended to be.

Specific enforcement of rectified contract

33 A contract in writing may be first rectified and then, if the plaintiff has so prayed in his plaint and the court thinks fit, specifically enforced ...

[9] It was also submitted that there were overwhelming external evidence in the form of the settlement agreement and the SPA3 to show that cl 2.2 of the SPA3 was a mistake and did not accord with the true intention of the parties. The SPA3 was a product of the settlement agreement and therefore must be compared with it to determine if cl 2.2 was a mistake and did not reflect the common intention of the parties. The settlement agreement was between the plaintiff and 15 companies of the Talam Group, including the defendant, to

settle the outstanding construction costs owing to the plaintiff at the agreed sum of RM56m. Clause 1.1 of the settlement agreement stipulated the agreed settlement sum of RM56m as 'the final absolute and agreed amount'. The Talam Group was to settle the sum part in cash (RM20m) and part by transfer of lands (RM36m), including the Lestari Puchong Land. Further, under the settlement agreement:

(a) vide cl 2.3.1, the Lestari Puchong Land was to be transferred 'free from all encumbrances' at the price of RM18m;

(b) vide cl 2.3.4, the plaintiff was to be given access to the said land 'without additional cost and expense'; and

(c) vide cl 2.3.7.1, the defendant was to bear the cost of subdivision and pay the premium.

[10] As for SPA3, it was provided that:

(a) by cl 7, the defendant undertook to sell the Lestari Puchong Land on the basis of cl 2.3 of the settlement agreement; wherein cl 2.3 of the settlement agreement provided that the defendant 'irrevocably agree to cause and procure at Talam Group own cost and expense ... the conveyance and transfer free from all encumbrances ...' the said land to the plaintiff for the value of RM18m;

(b) by cll 21.1 and 2.2, SPA3 was made 'subject to the Global Settlement Agreement';

(c) by cl 6.1, the defendant represented itself as the registered and beneficial owner of the Lestari Puchong Land with full power to sell the same;

(d) by cl 6.2, the defendant represented itself that the said land is 'free from all claims';

(e) by cl 6.12, the defendant represented itself that the said land 'is not subject to any encumbrances' and undertook not to create any charge of the said land without the express written consent of the plaintiff; and

(f) by cl 9, the defendant undertook that the said land 'shall be free from encumbrances immediately prior to the handing over of possession of the Property to the Purchaser'.

[11] Whilst the plaintiff submitted that there were overwhelming external evidence to show that cl 2.2 of the SPA3 was a mistake and did not accord with the true intention of the parties, the plaintiff at the same time acknowledged that there were contradictions in the provisions of the settlement agreement and the SPA3 and beseeched this court to determine what was the overriding objective of the parties. To the plaintiff, the overwhelming objective of the parties was to fulfil the settlement agreement whereby the SPA3 was an

agreement seeking to implement the settlement agreement by partially paying towards the settlement sum of RM56m. Clause 2.2 was contrary to the overall objective of the parties entering into the settlement agreement and the three implementing SPAs. Clause 2.2 was evidently a mistake and failed to express the true intention of the parties.

[12] The plaintiff further submitted that the learned trial judge had ignored the evidence of DW1 when he agreed during cross-examination that the term 'free of encumbrances' would mean without any liability attacking to the title and that the Lestari Puchong Land, pursuant to cll 2.3, 7 and 9, was to be free from encumbrances and ought to be transferred to the plaintiff free of encumbrances. DW1 had also admitted during cross-examination that it was not the plaintiff but the defendant who had redeemed the Lestari Puchong Land from Malayan Banking Bhd thereby corroborating the plaintiff's contention that the obligation to redeem the Lestari Puchong Land was the defendant's and not the plaintiff's. DW1 had also admitted that in the event the plaintiff paid the RM7m to discharge the Lestari Puchong Land, the settlement sum of RM56m would be reduced to RM49m.

[13] Based on the above submission, the plaintiff submitted that SPA3 should be rectified by deleting cl 2.2 and thereby bring the SPA3 into harmony with the settlement agreement.

[14] The defendant submitted that the learned trial judge had correctly arrived at the finding of fact that there was no common mistake as to the inclusion of cl 2.2 in the SPA3 based on the following evidence:

(a) there were many meetings between PW1, the plaintiff's general manager Mr Kalaisevan, Tan Sri Dato Chan Ah Chye, Puan Sri Datin Thong Nyok Choo, Chua Kim Lan and DW1 and the said meetings were over a period of 2–3 months;

(b) DW1's testimony that the plaintiff was informed in the said meetings on the subsisting legal charge over the Lestari Puchong Land (see p 94, question and answer 9, core bundle);

(c) PW1 was given the finalised copy of the agreements before he went to Messrs Yeap and Yong to sign them;

(d) the plaintiff's general manager had read the finalised copy of the agreements and confirmed to PW1 that the said agreements were all in order before PW1 went to Messrs Yeap and Yong's office to sign them;

(e) PW1 admitted that he did not request for time to read the agreements before signing them and had be requested for time, he would have been given time to read the agreements before signing them;

(f) the signed and stamped copy of the agreements had been given to the plaintiff and the plaintiff did not alert and complain to the defendant of the alleged mistake in cl 2.2 of the SPA3;

(g) cl 2.2 of the SPA3 was clear and unambiguous;

(h) the plaintiff only raised the alleged mistake in cl 2.2 after two years from the date of execution of the agreements;

(i) PW1 wanted to save money and therefore did not engage their own solicitors to peruse the agreements;

(j) PW1 admitted in cross-examination that he is able to speak and read English; and

(k) as for the issue of redemption sum vis Malayan Banking Bhd, the redemption was made by the purchasers of units sold and not by the defendant as seen in the question and answer on p 70, Tab 7, core bundle.

[15] As stated earlier, we had unanimously dismissed the plaintiff's appeal with agreed costs. In affirming her order, we found that the learned trial judge had not erred in law nor in fact in dismissing the plaintiff's claim, in particular as follows:

(a) in as much as the learned trial judge did not specifically refer to the provisions of ss 30–33 of the Act, she had in fact referred to the authority of the Federal Court case of *Yuson Bien* on the principles of rectification, and by her consideration of the pertinent facts we found that the learned trial judge had in effect applied the provisions of the said sections;

(b) we agreed with the learned judge when she made specific reference to the recital of the SPA3, that is, recital (B) (p 276, Tab 11 core bundle) which states:

> (B) The Project Land is charged to PENGURUSAN DANAHARTA NASIONAL BERHAD and MALAYAN BANKING BERHAD at the ratio 60:40.

and cl 2.2 of the SPA3 (see para 5 above) to conclude that these provisions were clearly complementary to each other and consistent with the parties' understanding vis the effect of cl 2.2. Further, recital (B) was followed by recital (F) to show that the SPA3 was executed to effectuate the parties' intention pursuant to the settlement agreement. Recital (F) states:

> (F) Simultaneous with the execution of this Agreement, the parties herein together with all such other parties identified/defined/referred to as 'TALAM-GROUP' and 'THE CONTRACTOR' are entering into a global settlement

agreement amongst themselves ['the Global Settlement Agreement'] for settlement of the Indebtedness by the TALAM-GROUP to THE CONTRACTOR upon the terms and conditions therein continued, (words, terms and phrases herein being defined in the Global Settlement Agreement.)

That being the case, we did not see how it could be said (by the plaintiff) that there was a mistake to include cl 2.2 in the SPA3. In fact it was essential to include cl 2.2 in order to enable the defendant to fulfil its other obligations to surrender the Puchong Lestari Land to the plaintiff. Clause 2.2 provided specifically that it was the plaintiff, as purchaser, to settle, pay, satisfy and redeem the Puchong Lestari Land at RM7m to Pengurusan Danaharta Nasional Bhd and Malayan Banking Bhd in the ratio of 60:40;

(c) it therefore followed that any other clauses, such as cll 6.2, 6.12 and 6.16 of the SPA3 which are contradictory to cl 2.2, must necessarily be read subject to cl 2.2;

(d) we found that the learned judge had correctly made findings of fact to found her judgment, especially those facts surrounding the negotiations and conclusion of the SPA3 and as an appellate court we do not see any reason to intervene in her findings;

(e) it was a significant fact found by the learned judge that after the plaintiff had signed the SPA3, it took the plaintiff two years to raise the issue of mistake in cl 2.2, in a situation where the plaintiff would be busy conducting its land development projects under the settlement agreement as well as under ten other agreements executed pursuant thereto;

(f) the fact that the redemption to Malayan Banking Bhd was done by the purchasers of the units sold did not equate it to be done by the defendant. This fact all the more showed the unfairness to the purchasers, let alone to the defendant, on the intransigence of the plaintiff which wanted to renege on a deal already struck with the defendant; and

(g) in the circumstances, we agree with the learned judge's finding that the plaintiff had failed to prove its case on the balance of probabilities.

Appeal dismissed with costs.

Reported by Kanesh Sundrum